



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 18, 1996

Ms. Lan P. Nguyen  
Assistant City Attorney  
City of Houston  
Legal Department  
P.O. Box 1562  
Houston, Texas 77251-1562

OR96-0056

Dear Ms. Nguyen:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 37200.

The City of Houston (the "city") has received two requests for numerous documents relating to the city's "High Technology Request for Proposal" for Liquid Polymer Flocculant, RFP No. TC-6-6810-025-009781." The city has made available to the requestors, two companies which responded to the RFP, their own proposals and seven other pages of the requested information. However, the city asserts that the remainder of the requested information is protected from required public disclosure under section 552.104 and, because the responsive proposals may contain proprietary information pertaining to third parties, section 552.110 of the Government Code.<sup>1</sup>

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of this exception is to protect the purchasing interests of a governmental body, usually in competitive bidding situations prior to the awarding of a contract. Open Records Decision No. 593 (1991) at 2. Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision 541 (1990) at 4.

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<sup>1</sup>The city makes no arguments of its own in support of the section 552.110 exception, electing to allow the companies whose proprietary interests may be implicated by this request to submit their own arguments to this office under section 552.305.

You state that a contract has not yet been awarded and that "public release of the requested information could impair the city's interest at this time." However, you do not specifically state how the city would be harmed by the release of this information at this time. Nevertheless, you suggest by your argument that the city may wish to protect its ability to negotiate with the different respondents, implying, at least, that the city still has the ability to negotiate. In Open Records Decision No. 170 (1977), this office stated that

[s]o long as negotiations are in progress regarding interpretation of bid provisions, and so long as any bidder remains at liberty to furnish additional information relating to its proposed contract, we believe that the bidding should be deemed competitive. Release of the bids while the bidding is still competitive would necessarily result in an advantage to certain bidders at the expense of others and could be detrimental to the public interest in the contract being let.

Open Records Decision No. 170 (1977) at 2.

Assuming that the bidding process is "still competitive" under the standard enunciated above, you may withhold, at this time, the requested information from required public disclosure under section 552.104. If the bidding process is no longer competitive, however, you may not rely on section 552.104 to withhold this information. Once the competitive bidding process is completed and a contract has been awarded, you may not continue to withhold this information under section 552.104. Open Records Decision No. 541 (1990) at 5.

Because section 552.110 may require you to withhold this information beyond the date that the contract is awarded, we still must address this exception.

Pursuant to section 552.305, we notified the parties whose proprietary interests may be implicated by these requests. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990). Only one of these parties, Allied Colloids, Inc. ("Allied"), responded to our notification by asserting that certain information relating to their proposal is excepted from required public disclosure under the Open Records Act. Since the other companies did not respond to our notification, we assume that they do not have a privacy or property interest in the requested information.

Section 552.110 excepts from disclosure trade secrets and commercial or financial information obtained from a person and confidential by statute or judicial decision. Section 552.110 is divided into two parts: (1) trade secrets and (2) commercial or financial information, and each part must be considered separately.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain

an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). When a governmental body takes no position with regard to the application of the “trade secrets” branch of section 552.110 to requested information, we accept a private person’s claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.<sup>2</sup>

We have considered Allied’s arguments with regard to that information relating to its proposal which Allied seeks to withhold under section 552.110. We conclude that Allied has failed to establish a prima facie case that this information is a trade secret.<sup>3</sup> Because we conclude that Allied has failed to establish a prima facie case that its information is a trade secret under section 552.110, and because we received no response from any other party whose proprietary interests may be implicated by this request, the city must release all the requested information to the requestor as soon as the competitive bidding process is completed and a contract has been awarded.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous

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<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: “(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company’s] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

<sup>3</sup>Allied has not claimed that that this information is either commercial or financial information and, therefore, we need not address the second part of section 552.110.

determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Todd Reese  
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Open Records Division

RTR/

Ref.: ID# 37200

Enclosures: Submitted documents

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